2005

Brief of Amicus Curiae the John Marshall Law School Fair Housing Legal Support Center in Support of Reversal of the Panel's Decision, Wisconsin Community Service, Inc. v. City of Milwaukee, Docket No. 04-1966, 465 F.3d 737 (Seventh Circuit Court of Appeals 2006)

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John Marshall Law School Fair Housing Legal Clinic

No. 04-1966

In The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WISCONSIN COMMUNITY SERVICE and
WISCONSIN CORRECTIONAL SERVICE
FOUNDATION, INC.,

Plaintiffs-Appellees,

v.

CITY OF MILWAUKEE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin, Case No. 01-C-575
The Honorable Judge Lynn Adelman

BRIEF OF AMICUS CURIAE THE JOHN MARSHALL LAW SCHOOL FAIR HOUSING LEGAL SUPPORT CENTER IN SUPPORT OF REVERSAL OF THE PANEL'S DECISION

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Appellate Court No: 04-1966

Short Caption: *Wisconsin Community Services, et. al., v. City of Milwaukee*

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Michael P. Seng and J. Damian Ortiz

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Attorney's Signature: _____ Date: October 17, 2005

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d) Yes__ No _X_

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Statement of Interest of Amicus Curiae

The mission of The John Marshall Law School Fair Housing Legal Support Center ("Center") is to educate the public on fair housing law and provide legal assistance to those private or public organizations that are seeking to eliminate discriminatory housing practices. The Center conducts national conferences and trainings on fair housing law and enforcement and is a national resource for attorneys, agencies, fair housing organizations, and trade associations in the housing, lending, and insurance areas. The Center coordinates the John Marshall Law School Fair Housing Legal Clinic ("Clinic"). The Clinic provides litigation and dispute resolution training for law students, and litigation and dispute resolution assistance to persons who complain of housing discrimination in violation of federal, state and local laws.

The Center will address the following issue in its brief: Does the Fair Housing Act establish a duty for a housing provider to make a reasonable accommodation for a person with a disability in the absence of proof that the rule, policy, practice, or service is itself illegal because of intentional discrimination or disparate impact? Amicus believes that this issue presents a broad question of policy with significant impact on the work of both housing litigants and those charged with administering the laws, the outcome of which will affect the equal opportunity of persons with disabilities to use and enjoy dwellings. While the Fair Housing Act is not directly applicable to this case because the zoning dispute does not involve a "dwelling," the Panel decision directly relied on the Fair Housing Act in limiting the application of the Rehabilitation Act and the Americans with Disabilities Act. For these reasons, Amicus believes that its participation will be of assistance to the Court.

Authority: This Brief is submitted along with a Motion for Leave to File the Amicus Curiae.

ARGUMENT

I. The Legislative History Establishes that a Housing Provider has a Separate and Independent Duty to Provide a Reasonable Accommodation to Persons with Disabilities under the Fair Housing Amendments Act.

The Fair Housing Amendments Act (hereinafter referred to as "FHAA") enacted by Congress in 1988 provides specifically that unlawful discrimination under the Act includes the "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a [disabled] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B)(West 2005). As such, FHAA constitutes "a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals." *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

Although, the FHAA is not directly applicable to this case, however, the Courts read the FHAA in conformity with how they interpreted the Rehabilitation Act of 1973 and the Americans with Disabilities Act. This interpretation is justified by the legislative history of these statutes. The Panel's decision in this case relies very heavily on the FHAA in reaching its conclusion that the plaintiffs did not establish a prima facie case of a failure to provide a reasonable accommodation, even though the FHAA was not at issue. This decision is not supported by the legislative history of the FHAA. Therefore, Amicus Curiae advocates to this Court to overrule the Panel and find that discrimination under the FHAA can occur when a housing provider fails to provide persons with disabilities a necessary reasonable accommodation.

A. Congress Intended the FHAA to Adopt the Regulations and Case Law Promulgated Under the Rehabilitation Act.

When the FHAA was passed in 1988, Congress discussed the Rehabilitation Act of 1973 at length in the House Judiciary Committee Report ("House Report"). In enacting the FHAA,

Congress knew that discrimination against disabled persons is "'often the product, not of invidious animus, but rather of thoughtlessness and indifference - of benign neglect.'" H.R. Rep. No. 100-711, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186 (quoting *Alexander v. Choate*, 469 U.S. 287 (1985)).

The House Report stated that the legislature was specifically adopting parts of the Rehabilitation Act and the case law pursuant to this Act:

> Handicapped persons have been protected from some forms of discrimination since Congress enacted the Rehabilitation Act of 1973, and the bill uses the same definitions and concepts from that well-established law… The Committee intends that the definition be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act… The concept of "reasonable accommodation" has a long history in regulations and case law dealing with discrimination on the basis of handicap. H.R. REP. 100-711, at 17, 22, 25.

Further, during the floor debates Congress set forth the entire three-part definition of handicap under the Rehabilitation Act that it was incorporating into the FHAA in a statement by Mr. Waxman. 134 Cong. Rec. H. 4912-03. (1988). More importantly, Congress expressed the intent that both the regulations promulgated under the Rehabilitation Act and the judicial interpretation of this Act be applied to the FHAA:

> The standards and interpretations of the term "handicap" in the Rehabilitation Act… see for example, 45 CFR 84 and 34 CFR 104 and the appendices attached thereto; and the interpretations by the Supreme Court in *School Board of Nassau v. Arline,* 480 U.S. 273 (1987) apply to the definition included in the bill. Statement by Mr. Harkin during debates in the Senate. 134 Cong. Rec. S. 10454 (1988).

The Rehabilitation Act grants disabled individuals the right to a "reasonable accommodation." *Id.* Both regulations referred to by Congress above, include provisions for reasonable accommodations. 45 CFR 84.12 and 34 CFR 104.12. Further, under 28 CFR 41.53 the Department of Justice, acting under the authority to establish regulations pursuant to the

Rehabilitation Act, enacted a right to reasonable accommodation for individuals with handicaps in regard to employment. Congress incorporated the regulations promulgated under the Rehabilitation Act, and specifically those that relate to the definition and entitlements of a "handicapped person."

Therefore, although the regulation was labeled "Employment" when it was written by the Department of Justice, because Congress explicitly adopted the regulations, it is applicable to the FHAA and housing matters.

B. Requiring Proof of Intentional Discrimination or Disparate Impact as a Precondition for Considering a Reasonable Accommodation Is at Odds with the Legislative History that Focuses on Individuals.

One of the major reasons for the adoption of the FHAA was to include people with disabilities as a protected class under the Fair Housing Act. The House Report emphasizes that:

> The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as *individuals*. H. R. Rep. 100-711, at 18. (Emphasis added).

In addition to adopting the definitions, regulations, and case law in the Rehabilitation Act, in an effort to reach the goal of eliminating discrimination against individuals with disabilities, the Department of Housing and Urban Development ("HUD"), was granted the authority to establish regulations under the FHAA. One of these regulations, 24 CFR §100.204 (West 2005), prohibits any person from refusing to grant, "a reasonable accommodation in rules, policies, practices or services," to a person with disabilities, if this denial would preclude the disabled person from an equal opportunity to use and enjoy the premises.

Congress did not intend that a person with disabilities would only have a cause of action to obtain a reasonable accommodation after first proving either discriminatory intent or

discriminatory impact. Nothing in the legislative history of the FHAA supports the decision of the panel that the determination whether the denial of a reasonable accommodation was illegal is a two-step process. Under this process, the panel's new requirement, a person with a disability would first be required to prove that the policy or practice was either promulgated or enforced with the intent to discriminate or that the policy or practice had a discriminatory effect. Once discrimination is established, a person would be required to prove that the denial of the accommodation was itself unreasonable.

Case law has established that the disparate impact claims generally involve more than one individual:

> The relevant question in a discriminatory effects claim against a private defendant, however, is not whether *a single act or decision* by that defendant has a significantly greater impact on members of a protected class, but instead the question is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on *members* of a protected class. *Simms v. First Gibraltar Bank,* 83 F.3d 1546, 1555 (5th Cir. 1996) (emphasis added).

Because disparate impact cases tend to rely on general statistics and often involve many defendants or even class actions, these cases are very difficult for one individual to prove. Unlike other protected classes, all people with disabilities are not necessarily similarly situated. People with disabilities are not all adversely affected by the same type of policies or rules because the disabilities vary.

Therefore, if this Court interprets the FHAA to require proof of discriminatory intent or disparate impact prior to the right to a reasonable accommodation, this would require an individual suffering the discrimination to prove discriminatory intent because proof of disparate impact on an individual basis would be impossible. Clearly this goes against the intent of Congress, which was to grant a right to a cause of action to disabled individuals.

C. Congress Intended that the FHAA Add New Protections to Assist Persons with Disabilities.

Throughout the congressional debates and the House Report, Congress expressed its intent that the FHAA was an expansion of the law under the original Fair Housing Act:

> We should explore what are the purposes and the foundations of the fair housing law, and indeed they are to prevent discrimination in housing, but they are also intended, that *law is intended to expand options, to expand alternatives* to those who have been the victims of discrimination and those who are now in the various protected classes. Statement by Mr. Feighan. 134 Cong. Rec. H. 4898 (1988) (emphasis added).

A requirement of proving disparate impact, as explained above, would actually require proof of discriminatory intent in many cases because of the individualized and unique problems people with different disabilities face. If the Court enforced this requirement, the law as applied to people with disabilities would be narrower than the protection afforded to other protected classes under the original Fair Housing Act. Nevertheless, Congress clearly expressed the intent to expand the law. Accordingly, it follows that the right to a reasonable accommodation was the manner in which Congress realized its intent to "expand alternatives." 134 Cong. Rec. H. 4898 (1988).

Both the language of the statute and its legislative history indicate a much more streamlined process: Discrimination occurs when there is a denial of a reasonable accommodation that prevents a person with a disability from enjoying the dwelling the same as anyone else. The House Report specifically states:

> New subsection 804(f)(3) [3604(f)(3)] sets out specific requirements to *augment* the general prohibitions under (f)(1) and (2). These include provisions regarding reasonable modifications to existing premises, "reasonable accommodation" and accessibility features in new multifamily housing construction. H.R. REP 100-711, at 25. (Emphasis added)

The dictionary meaning of "augment" is "to enlarge or increase." Webster's Third New International Dictionary (1981), p. 143. In other words, "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to a buyer or renter," §3604(f)(1), or "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with such dwelling," §3604(f)(1), is enlarged by including in the definition of discrimination "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling," §3604(f)(3)(B). Therefore, the right to a reasonable accommodation is a separate cause of action for individuals with disabilities.

II. Courts Must Give Deference to the Regulations Promulgated by HUD and HUD'S Interpretation of the FHAA.

A. Deference to HUD is Granted by Congress and Explained in Case Law.

Congress specifically granted powers to HUD to promulgate regulations and to act as a regulating authority in housing matters. 42 USCS § 3535 (2005)**.** Under the FHAA in 1988, Congress expanded the role of HUD by granting them the power to conduct additional administrative procedures to adjudicate housing disputes. H.R. REP 100-711, at 17. The United States Supreme Court has held that the Department of Housing and Urban Development's interpretation of the Fair Housing Amendments Act is entitled to deference. *Meyer v. Holley,* 537 U.S. 280 (2003), citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979).

B. The Joint Statement Issued by HUD and Department of Justice Establishes an Entitlement to a Reasonable Accommodation as a Separate Cause of Action.

In 2004, the combined efforts of the U.S. Department of Justice Civil Rights Division ("DOJ") and the HUD's Office of Fair Housing and Equal Opportunity ("HUDEO") issued a joint statement entitled, "*Reasonable Accommodations Under the Fair Housing Act*." (May 17, 2004, Wash. D.C.) (Hereinafter referred to as "Joint Statement" attached hereto as Appendix "A".)[1]

This statement explains who is required to comply with the FHAA's provision for reasonable accommodations:

> Any person or entity engaging in prohibited conduct – *i.e*., refusing to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability an equal opportunity to use and enjoy a dwelling. Joint Statement, p. 3, (2004).

The Joint Statement does not say that a reasonable accommodation is the remedy after a disabled person first demonstrates discriminatory intent or effect. Rather, it is clear that the violation of the FHAA comes from the failure to grant a reasonable accommodation alone and not from a prior finding of discriminatory intent or impact.

Further evidence supporting that a reasonable accommodation is a cause of action separate and apart from proving either discriminatory intent or impact can be found in the examples used throughout the Joint Statement. The following examples are given as situations in which a person with a disability would be entitled to a reasonable accommodation: 1) a

[1] This statement was an attempt to define the law relating to reasonable accommodations. The purpose of the statement, as stated in the Introduction to the Joint Statement is to, "provide technical assistance regarding the rights and obligations of persons with disabilities and housing providers under the [Fair Housing] Act relating to reasonable accommodations." Joint Statement, p. 1, (2004). The Joint Statement explains that the right to a reasonable accommodation under the Fair Housing Act generally applies to requests under Section 504 of the Rehabilitation Act. Joint Statement, p. 2, (2004). This is further evidence that the obligations under the Rehabilitation Act also apply to the FHAA.

woman is denied an apartment because she lists her current residence as a group home for women recovering from alcoholism; 2) a tenant is evicted after he threatens another tenant because of a policy against threatening violence against those in the building. The tenant has a mental disability that causes him to be violent when he is off his medication, but he can assure the landlord that he will take his medication and be monitored; 3) a resident with a mobility impairment is denied a close parking space due to a policy that provides for spaces to be given out on a first come, first serve basis; 4) a deaf tenant is denied a dog because of a no pets policy, the tenant uses the dog to alert him to noises such as the doorbell, the smoke alarm, and the telephone; 5) a tenant with a physical disability that cannot open the dumpster as required to dispose of trash is denied any accommodation and 6) a man with a mobility impairment is denied the ability to use a motorized scooter in a building because of a policy that denies use of motorized vehicles indoors. (See, Joint Statement.)

One of the points the Joint Statement particularly highlights is that a right to a reasonable accommodation is a separate cause of action:

> A housing provider has a policy of requiring tenants to come to the rental office in person to pay their rent. A tenant has a mental disability that makes her afraid to leave her unit. Because of her disability, she requests that she be permitted to have a friend mail her rent payment to the office as a reasonable accommodation. The provider must make an exception to its payment policy to accommodate this tenant. Joint Statement, at 6.

It would be difficult for the tenant to prove intentional discrimination with the facially neutral policy. Further, there will not be the requisite statistics available to prove that there is a disparate impact against someone who has a disability that makes her afraid to leave her home.

Therefore, the right to a reasonable accommodation focuses on *individuals* with disabilities, when the tenant is entitled to the accommodation, even in the absence of proof of disparate impact or discriminatory intent.

III. Case Law Establishes that a Housing Provider has a Separate and Independent Duty to Provide a Reasonable Accommodation to Persons with Disabilities Under the Fair Housing Act.

Circuit Courts of Appeal across the country have uniformly analyzed reasonable accommodation claims independent of those claims based on a theory of intentional discrimination or disparate impact. In applying the reasonable accommodation standard, there are three elements to consider. First, courts look at whether persons with disabilities have "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B); *Smith & Lee Assoc., Inc. v. City of Taylor*, 102 F.3d 781, 794 (6th Cir. 1996). Second, courts determine whether the requested accommodation "may be necessary" to afford a person with a disability equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B); *Id.* at 794-95. Third, courts consider whether the accommodation is "reasonable." 42 U.S.C. § 3604(f)(3)(B); *Id.* The decisions do not state anything about an antecedent requirement to prove pre-existing intentional discrimination or disparate impact.

A. The Seventh Circuit Court of Appeals Did Not Require Antecedent Proof of Intentional Discrimination or Disparate Impact in Cases Involving a Reasonable Accommodation under the FHAA Prior to the Panel's Opinion.

The Seventh Circuit has applied the FHAA's reasonable accommodation provision in numerous cases and has never before held that a housing provider has no duty to make a reasonable accommodation for a disabled person in the absence of proof that the rule, policy, practice or service is itself illegal because of intentional discrimination or disparate impact. *Good Shepard Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557 (7th Cir. 2003) and *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995). In *Good Shepard*, this Court unequivocally stated that:

> "(f)ailure to reasonably accommodate" is an alternative theory of liability. The theory would be entirely redundant if it required proof that the defendants' actions were motivated by animus towards the [disabled]. Indeed, for the reasonable accommodation theory to be meaningful, it must be a theory of liability for cases where we assume there is a valid reason behind the actions of the city, but the city is liable nonetheless if it failed to reasonably accommodate the disability of the plaintiff. *Id.* at 562.

Similarly, as the Honorable Judge Wood stated in her dissent to the panel's decision, "Here, only the disabled would have any interest in the particular service or facility at issue; because the non-disabled are indifferent to it, there would never be a way to prove the disproportionate impact required by the [majority's] theory." *Wisconsin Community Service v. City of Milwaukee,* 413 F.3d 642, 650-651 (7th Cir. 2005) (Wood, J. dissenting)

B. The Circuits are Uniform in Their Separate Approach to Reasonable Accommodation Claims.

The Circuit Courts of Appeal uniformly separate a FHAA claim of intentional discrimination or disparate impact from a claim involving reasonable accommodation. For example, the Sixth Circuit has found that plaintiffs who fail to establish intentional discrimination under the FHAA are nevertheless entitled to a judgment under a reasonable accommodation theory. *Smith & Lee Associates, Inc. v. City of Taylor,* 102 F.3d 781 (6th Cir. 1996). In *Smith & Lee Assoc*., the court held that a zoning variance allowing nine residents to reside together in a residential neighborhood was a necessary accommodation. *Id.* at 795. The court reasoned that group homes would not otherwise be possible in residential neighborhoods since twelve residents were needed to make the operation financially viable. *Id*. Thus, the court envisioned making accommodations for individuals with disabilities for financial reasons rather than for any reason directly related to the individuals' disabilities. The court observed that handicapped persons may have little choice but to live in a commercial home and in order to

provide the handicapped with equal housing opportunities, the City must make the necessary reasonable accommodations. *Id.* at 930.

The Fourth and Tenth Circuits are in accord with the Sixth Circuit's analysis. *Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F. 3d 597 (4th Cir. 1997); and *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995).

Other Courts of Appeal have decided FHAA claims solely on the failure to reasonably accommodate disabled persons without discussing any other theory of liability. *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2nd Cir. 1995); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996); *Elderhaven, Inc. v. City of Lubbock, Tx*, 98 F.3d 175 (5th Cir. 1996); *Groner v. Golden Gate Garden Apartments*, 250 F.3d 1039 (6th Cir. 2001); *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004); and *United States v. California Mobile Home Park Management*, 29 F.3d 1413 (9th Cir. 1994). These Courts have recognized that the reasonable accommodation inquiry is "highly fact-specific, requiring case-by-case determination." *Id.*, at 1418.

Similarly, the Eighth Circuit Court of Appeals, which adopts a standard for reviewing zoning ordinances that is highly deferential to local governments, has not deviated from the approach of considering reasonable accommodation claims as separate causes of action. *See Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996).

Therefore, the Courts uniformly recognize that the FHAA independently obliges housing providers to make reasonable accommodations and this Court should not deviate from the legislative purpose and its precedent.

IV. Conclusion

The Fair Housing Act establishes a duty to make a reasonable accommodation for a person with a disability in the absence of proof that the rule, policy, practice, or service is itself illegal because of intentional discrimination or disparate impact. Therefore, Amicus Curiae, respectfully petitions this Court to reverse the decision of the Panel.

Dated: October 17, 2005

Respectfully submitted,

The John Marshall Law School
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